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ity of adoption is a political or judicial question; a difficulty which can only be pointed out without discussion here.<sup>24</sup> The difficulty of treating it as a judicial question is evidenced by a peculiar doctrine of our law. Courts which declare their power to overthrow an invalid amendment, will refuse to do so if such an amendment has been in force unquestioned for a considerable time.<sup>25</sup> To reconcile these two ideas seems impossible; but the doctrine may indicate that this should more properly be treated as a political question, and that the courts should have no power to overthrow any amendment which the other branches of the government have recognized as valid. These questions seem to bare a weak spot in our governmental system. But it is weaker in theory than in practice. The absence of any definite rule is of little consequence where a few cases arise; it is of even less consequence when those cases are such that the practical results of a decision must and should weigh heavily in making it.

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NEGLIGENCE IN THE LAW OF DEFAMATION.—The ghost of malice, many a time laid by text-writers and judges,<sup>1</sup> still returns to plague the courts in suits for slander or libel. In England, since the famous *Artemus Jones* case,<sup>2</sup> malice is, it is true, no more than a formality of pleading. A late Alabama decision, however, gives the term a more substantial vitality. The publisher of a city directory, through an innocent error, placed an asterisk before the name of the plaintiff, that being the customary mode of designating a negro. The plaintiff, of pure Caucasian blood, brought suit for libel. Conceding the Southern doctrine that it is libelous to call a white man a negro,<sup>3</sup> the court nevertheless denied recovery, on the ground that where published matter, though "calculated to defame and injure another," is not "necessarily libelous," the defendant can rebut the usual presumption of malice by showing that he acted neither recklessly nor with knowledge that the words were libelous. *Jones v. R. L. Polk & Co.*, 67 So. 577.

It is one of the results of the unfortunate terminology of the common law of libel that three distinct issues, each susceptible of separate defini-

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*People v. Sours*, 31 Colo. 369, 74 Pac. 167; *In re McCaughy*, 106 Minn. 392, 119 N. W. 408; *Lobaugh v. Cook*, 127 Ia. 181, 102 N. W. 1121; *State v. Winnett*, 78 Neb. 379, 110 N. W. 1113. Whether a sufficient number of votes has been cast to ratify is a judicial question. *In re Denny*, 156 Ind. 104, 59 N. E. 359; *Rice v. Palmer*, 78 Ark. 432, 96 S. W. 396; *State v. Powell*, 77 Miss. 543, 27 So. 927. In the following cases the popular ratification has been held defective. *Collier v. Frierson*, 24 Ala. 100; *State v. Swift*, 69 Ind. 505.

<sup>24</sup> It is apparent that the whole tendency of our courts is to treat this as a judicial question. See cases in n. 23. *Dodd*, 209 *et seq.* Where there is no popular ratification, this seems sound, although that it may lead to difficulties is apparent from the cases cited *infra*, n. 25.

<sup>25</sup> *Weston v. Ryan*, 70 Neb. 211, 97 N. W. 347; *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221; *cf. Peck v. Pease*, 18 How. (U. S.) 595.

<sup>1</sup> See especially BOWERS, CODE OF ACTIONABLE DEFAMATION, Appendix II, and cases there cited. Also Jeremiah Smith, "Jones v. Hulton," 60 PA. L. REV. 365, 367 ff.

<sup>2</sup> *E. Hulton & Co. v. Jones*, [1909] 2 K. B. 444, [1910] A. C. 20.

<sup>3</sup> *Flood v. News & Currier Co.*, 71 S. C. 112, 50 S. E. 637.

tion, have been bundled together under the term "malice." To make out a case of defamation, a plaintiff must show an injury to his reputation, and a culpable relation to that injury on the part of the defendant. The burden is then on the defendant to relieve himself from this *prima facie* liability by establishing an excuse, such as the truth of the words, or a privilege of uttering them, though false.<sup>4</sup> It is clear that as to the element of excuse, every person acts at peril. An honest, and even a reasonable belief that defamatory words are true, or, it is conceived, that they were privileged, will afford no excuse if in fact the words were false, or the occasion unprivileged.<sup>5</sup> There seems to be no modern decision disputing this proposition.

Before the excuse element enters into the case, however, some culpable relation between the defendant and the injury to the plaintiff's reputation must be established. Two issues are involved in this part of the inquiry: one concerns the application of the words to the person who is suing, the other their defamatory character. The question is what degree of culpability in these two respects is necessary to render the defendant liable.

As to the first issue, it is only in rare cases that there is any doubt that the application of the words to the plaintiff was intentional. Some American decisions consider an intention to apply the words to the plaintiff essential.<sup>6</sup> The English House of Lords, on the other hand, have unanimously concluded that one who publishes defamatory words of a supposedly imaginary person, takes the risk that they may be within the ambit of publication some person to whom a substantial body of the public may apply the words.<sup>7</sup> In this respect, written words are placed in the familiar category of acts done at peril, together with trespass to chattels or realty, injury by wild beasts, or by water artificially stored.<sup>8</sup>

As to the defamatory character of the words, a similar issue arises. One may suppose words on their face innocent, but in fact conveying a meaning which, in the mind of a person acquainted with certain extrinsic facts, is highly defamatory. What must be the relation of the defendant to those extrinsic facts? In an early New York case it was decided that "where a hidden defamatory meaning is sought to be attributed to words in themselves innocent, and on their face containing no such sense, by extrinsic facts outside and independent of the publication itself, the knowledge of such facts must be shown by averment and

<sup>4</sup> See Holmes, "Privilege, Malice, and Intent," 8 HARV. L. REV. 1. Cf. M'Pherson v. Daniels, 10 B. & C. 263, 272.

<sup>5</sup> ODGERS, LIBEL AND SLANDER, 5 ed., p. 181; BOWERS, CODE OF ACTIONABLE DEFAMATION, p. 88, n. 1; Jeremiah Smith, "Jones v. Hulton," 60 PA. L. REV. 365, 372.

<sup>6</sup> Smart v. Blanchard, 42 N. H. 137; Smith v. Ashley, 52 Mass. (11 Met.) 367. The latter case was relied on by the court in the principal case. It has been doubted, however, in its own jurisdiction. Hanson v. Globe Newspaper Co., 159 Mass. 293, 295, 303. The view that, prior to the decision in the Artemus Jones case, libel belonged to the class of intentional injuries was shared by the learned editor of the LAW QUART. REV., vol. 25, p. 341. See also 26 LAW QUART. REV. 103. This view is ably presented in the dissenting opinion of Fletcher Moulton, L. J., in the Court of Appeal, in Jones v. E. Hulton & Co., [1909] 2 K. B. 444, 458.

<sup>7</sup> E. Hulton & Co. v. Jones, [1910] A. C. 20.

<sup>8</sup> See the famous opinion of Blackburn, J., in Fletcher v. Rylands, 4 H. & C. 263, 269.

proof to have existed in the breast of the defendant at the time of publication.”<sup>9</sup> On the other hand, in a Scotch case a birth notice, printed by a newspaper in good faith and in the normal course of business, was held actionable because of the extrinsic fact, entirely unknown to the publisher, that the supposed parents had been married less than a month.<sup>10</sup> This decision has found general favor with text-writers.<sup>11</sup>

Between liability at peril and liability only for intentional harm an intermediate position has been suggested, and in a few instances acted upon—that as to the applicability of the words to the plaintiff and their defamatory character as determined by extrinsic facts the law should set only a standard of due care.<sup>12</sup> This would not be inconsistent with the settled rule that as to the truth of words due care is not defense. The law may well require an excuse to be established at peril, once *prima facie* liability exists, and yet hesitate to impose that *prima facie* liability without fault. A standard of negligence, unless there are countervailing considerations of social policy, most nearly approaches the popular conception of justice, for when a jury says a man has acted negligently, it is merely saying in artificial words that he has so conducted himself that he in justice should bear the loss.<sup>13</sup> Grounds of social policy must be invoked, to justify holding a man liable who has acted reasonably.<sup>14</sup> But considerations such as those which justify ab-

<sup>9</sup> *Caldwell v. Raymond*, 2 Abb. Prac. (N. Y.) 193.

<sup>10</sup> *Morrison v. Ritchie Co.*, 4 Scotch Sess. Cas., 5th ser. 645. For a discussion of this case, see 22 JURID. REV. 254. See, however, n. 14, *infra*.

<sup>11</sup> SALMOND, TORTS, 3 ed., 411; Jeremiah Smith, “*Jones v. Hulton*,” *supra*, at p. 473.

<sup>12</sup> *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392. On account of misplaced initials, a defamatory statement appeared on its face to refer to the plaintiff. The court below required an intent to defame the plaintiff. The appellate court reversed, saying that carelessness would be enough. But see same case, 118 Cal. 366.

*Clark v. North American Co.*, 203 Pa. 346, 53 Atl. 237. The defendant published a news report that “John Clark, Watchman in Starr Jordan Park,” had been arrested for burglary. James Clark, a watchman in Starr Garden Park, and a brother of the John Clark who was arrested, sued. The court held erroneous an instruction that the question was whether the plaintiff was meant by the article. The jury should consider, the court said, “whether, notwithstanding the difference in name, the description was such either intentionally or by want of due care and diligence in ascertaining the true facts, that there would be a natural and reasonable inference that the plaintiff was the person referred to.”

But see, on the other hand, Williston, “Liability for Honest Misrepresentation,” 24 HARV. L. REV. 415, 436: “The whole law of defamation is inconsistent with any application of the law of negligence to either spoken or written words.” And POLLOCK, TORTS, 9 ed., 568: “Generally speaking, there is no such thing as liability for negligence in word as distinguished from act; and this distinction is founded in the nature of the thing.”

<sup>13</sup> See HOLMES, THE COMMON LAW, 94 ff. See also, by the same author, “Law in Science and Science in Law,” 12 HARV. L. REV. 443, 458.

<sup>14</sup> Even the Scotch court seems to hesitate at carrying to its full conclusion the theory of liability at peril. In *Wood v. Edinburgh Evening News, Ltd.*, 1910 Scotch Sess. Cas. 895, a newspaper, in good faith, printed an advertisement reading “Nurse (wet) wanted immediately. Apply Kinlieth Arms, Juniper Green.” The advertisement appears to have been furnished by a practical joker, for the only married couple at the address had been wedded only five months. This couple brought suit, but the court held that the words would not bear the innuendo of immorality sought to be put upon them. Two of the judges reserved opinion, despite the earlier case of *Morrison v. Ritchie* (*supra*, n. 10) whether a newspaper would be liable without negligence for a statement on its face innocent. This was a case, it will be noted, which com-

solute liability in workmen's compensation laws are obviously absent in libel cases.<sup>15</sup>

In the principal case the mistake was primarily one as to the truth of the publication. The statement was that the plaintiff was a negro, and the defense was that this statement, though untrue, was made without recklessness or knowledge of falsity. Obviously this would be no defense where the elements of *prima facie* liability exist. It is a peculiarity of this class of libels, however, that truth is not only an excuse, but negatives *prima facie* liability, for to say of a man that he is a negro is considered injurious to his reputation only if he was in fact, or at least by repute, a white man. The case falls, therefore, in the category of words on their face innocent, but defamatory because of extrinsic unknown facts.

THE INCOME TAX AND THE SIXTEENTH AMENDMENT. — Under the Constitution, taxes are divided into two classes,<sup>1</sup> it being provided that direct taxes must be apportioned among the states,<sup>2</sup> and that duties, excises, and imports shall be uniform.<sup>3</sup> The Sixteenth Amendment, ratified in 1913, gives Congress power to lay a tax on income "from whatever source derived," without apportionment. In *Brushaber v. Union Pacific R. R. Co.*,<sup>4</sup> Mr. Chief Justice White, upholding the income tax imposed by the Tariff Act of 1913, construed the Amendment as a declaration that an income tax is "indirect," rather than as making an exception to the rule that direct taxes must be apportioned. This construction was unnecessary to the result of the case, for, although a contrary result would, as the court said, make two parts of the Constitution inconsistent, it is perfectly possible for an Amendment to make an exception to a constitutional rule or even a complete change therein. Nevertheless, the interpretation adopted by the court will probably be accepted, as the Amendment was hardly intended to create a tax subject neither to apportionment nor to uniformity, and so the case seems to settle the place of the income tax in the constitutional scheme of classification.

The exact distinction between a "direct" and an "indirect" tax does not seem to have been very clearly understood by the framers of the Constitution.<sup>5</sup> The shiftableness of the ultimate burden is the usual

bined the features of the Artemus Jones case and the Morrison case: it involved the issue of the degree of culpability both with respect to the application of the words to the plaintiff and the defamatory character of the words.

<sup>15</sup> See Wambaugh, "Workmen's Compensation Acts," 25 HARV. L. REV. 129.

<sup>1</sup> It seems to be generally agreed to-day that all possible taxes fall within one or the other of the two constitutional classes. See *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 557. It was formerly believed, however, that there might be a tax falling in neither class, which Congress might levy in any manner it saw fit. See *Hylton v. United States*, 3 Dall. (U. S.) 171, 173, 176. See 1 STORY, ON THE CONSTITUTION, 5 ed., § 955.

<sup>2</sup> Art. I, Sec. 2, cl. 3; Art. I, Sec. 9, cl. 4.

<sup>3</sup> Art. I, Sec. 8, cl. 1.

<sup>4</sup> Sup. Ct. Off., No. 140, decided January 24, 1916. See RECENT CASES, p. 558.

<sup>5</sup> Mr. Madison records: "Mr. King asked what was the precise meaning of direct taxation. No one answered." See *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 563.